No. 11048

In the United States Circuit Court of Appeals

For the Ninth Circuit

E. H. CLARKE LUMBER COMPANY,

an Oregon Corporation,
Appellant,

vs.

P. N. KURTH,
Appellee.

Brief of Appellant

E. H. CLARKE LUMBER COMPANY

Upon Appeal from the District Court of the United States for the District of Oregon.

Of Counsel

HART, SPENCER, McCULLOCH & ROCKWOOD,
Yeon Building,
Portland, Oregon.

HAMPSON, KOERNER, YOUNG & SWETT,
Pacific Building,
Portland, Oregon.

R. N. KAVANAUGH,
Mead Building,
Portland, Oregon

HUGH L. BIGGS,
DAVID L. DAVIES,
Yeon Building,
Portland, Oregon

R. R. MORRIS,
Pacific Building,
Portland, Oregon
Attorneys for Appellant.

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Upon Appeal from the District Court of the United States for the District of Oregon.

JURISDICTION OF THE COURT

Jurisdiction of the District Court was founded upon Sec. 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C.A. Sec. 216) (R. p. 2) and Sec. 41-8 of the Judicial Code.

Jurisdiction of the Circuit Court of Appeals is founded upon Section 128, as amended, of the Judicial Code (28 U.S.C.A. Sec. 225(a)(1)). This appeal has been taken from a final decision of the District Court of the United States for the District of Oregon within the meaning of Section 128 of the Judicial Code.

STATEMENT OF CASE

This action was instituted by Appellee and Cross-Appellant Kurth, hereafter called Appellee, to recover overtime wages, liquidated damages and attorneys' fees under the Fair Labor Standards Act of 1938. (R. p. 2). Appellee, prior to the institution of the action, had been employed by Appellant Clarke Lumber Company. He was engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act. (R. p. 13). His services for Appellant terminated in September of 1942. (R. p. 14). In March, 1943, the Oregon Legislature, at its general session, legally enacted a statute limiting to six months the time within which action for the recovery of overtime, premium pay or liquidated damages, required or permitted by any statute, might be brought; with the proviso that suits on accrued causes of action must be instituted within ninety days from the effective date of the law. (R. p. 15).[1] The statute carried an emergency clause by virtue of which it became effective upon its passage. The governor approved the statute March 16, 1943. This action was instituted by

[1] Ch. 265, O.L. 1943, Appendix I.

Appellee on February 10, 1944. (R. p. 15). Appellant pleaded the statute of limitations as a bar to recovery. It is admitted that, if the statute does not prevent recovery by Appellee, he is entitled to recover judgment in the amount of $427.38. (R. p. 18).

The sole question involved is the constitutionality of the Oregon statute of limitations, Chapter 265 Session Laws of 1943. If constitutional, it is admitted that it is a bar to this action. The District Court held, after trial upon the merits, that the statute could not be constitutionally applied to the claim of Appellee because to do so would unreasonably interfere with interstate commerce in that it would constitute an unreasonable interference with the prosecution by Appellee of rights granted him by federal law. (R. pp. 33, 34). The opinion of the Court is found at pages 24-28 of the printed record.

SPECIFICATION OF ERRORS

The District Court erred in the following respects:

1. In holding that Chapter 265 was not a bar to this action.

2. In holding, that the ninety day period within which suit might be instituted upon causes of action accrued at the time of its enactment, was an unreasonably short period for the institution of action.

3. In failing to hold that if the ninety day period were unreasonably short, the six months general period allowed by the statute applied.

4. In failing to hold, that the six months general period allowed by the statute afforded Appellee a reasonable time within which to institute action with the result that the statute is constitutional.

SUMMARY OF ARGUMENT

1. Statutes of limitations are entitled to the same consideration at the hands of the court as are other types of statutes.

Clementson v. Williams, 12 U.S. (8 Cranch) 72, 74, 3 L. Ed. 491;
United States v. Wilder, 80 U.S. (13 Wall.) 254, 256, 20 L. Ed. 681;
Bell v. Morrison, 26 U.S. (1 Pet.) 351, 360, 7 L. Ed. 174;
Beatty v. Burnes, 12 U.S. (8 Cranch) 98, 107-108, 3 L. Ed. 500;
Pillow v. Roberts, 54 U.S. (13 How.) 472, 477, 14 L. Ed. 228;
Leffingwell v. Warren, 67 U.S. (2 Black) 599, 606, 17 L. Ed. 261;
Hanger v. Abbott, 73 U.S. (6 Wall.) 532, 538, 18 L. Ed. 939;
Riddlesbarger v. Hartford Insurance Co., 74 U.S. (7 Wall.) 386, 389-390, 19 L. Ed. 257;
Edwards v. Kearzey, 96 U.S. 593, 603, 24 L. Ed. 793;
Campbell v. City of Haverhill, 155 U.S. 610, 616, 39 L. Ed. 280, 15 Sup. Ct. 217;
United States v. Oregon Lumber Co., 260 U.S. 290, 67 L. Ed. 261, 43 Sup. Ct. 100;
McCluny v. Silliman, 28 U.S. (3 Pet.) 270, 278-279, 7 L. Ed. 676;

Campbell v. Holt, 115 U.S. 620, 628, 29 L. Ed. 483, 6 Sup. Ct. 209;
Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348-349, 88 L. Ed. 788; Sup. Ct. 582.

2. The State of Oregon had the power to enact a statute of limitations applicable to cause of action created by federal law as no period of limitation was imposed by Congress.

Judiciary Act of 1787, Sec. 34;
Campbell v. City of Haverhill, 155 U.S. 610, 616, 39 L. Ed. 280, 15 Sup. Ct. 217;
Brody v. Daly, 175 U.S. 148, 44 L. Ed. 109;
McClaine v. Rankin, 197 U.S. 154, 49 L. Ed. 702.

3. The Oregon statute does not offend the due process clause.

(a) Appellee was afforded a reasonable time by the statute within which to institute this action.

Evans v. Finley, 166 Ore. 227, 111 P. (2d) 833; Ibid Note 14;
Terry v. Anderson, 95 U.S. 628, 633, 24 L. Ed. 365;
Mills v. Scott, 99 U.S. 25, 27, 25 L. Ed. 294;
Antoni v. Greenhow, 107 U.S. 769, 774-775, 27 L. Ed. 468, 2 Sup. Ct. 91.

(b) A period of ninety days from the effective date of the law was ample for the institution of the action by Appellee.

State ex rel., v. Board of Education, 137 Kan. 451, 21 P. (2d) 295—1½ months;
Vanderbilt v. Hegeman, 157 Misc. 908, 284 N.Y.S. 586. In *Bacon et al. v. Howard,* 61 U.S. (20

How.) 22, 15 L. Ed. 811, a 60 day statute was applied, and there was no contention that it was unreasonable;
Crawford v. Hunt, 41 Ariz. 229, 17 P. (2d) 802;
Steele v. Gann, 197 Ark. 480, 123 S.W. (2d) 520;
De Moss and others v. Newton and another, 31 Ind. 219;
Kozisek v. Bringham, 169 Minn. 57, 210 N.W. 622;
Wooten v. Pollock, 116 N.J. Eq. 490, 174 A. 497;
Union County Building & Loan Ass'n. v. Welchek, 12 N.J.M. 847, 175 A. 625.

(c) If there be doubt as to the reasonableness of the ninety day period, then the six month general period applies. That period is a reasonable one within which to start this action.

Koshkonong v. Burton, 104 U.S. 668;
McLaughlin v. Hoover, 1 Ore. 31;
Pitman v. Bump, 5 Ore. 17;
Crawford v. Hunt, 41 Ariz. 229, 17 P. (2d) 802;
Steele v. Gann, 197 Ark. 480, 123 S.W. (2d) 520;
De Moss and others v. Newton and another, 31 Ind. 219;
Kozisek v. Bringham, 169 Minn. 57, 210 N.W. 622;
Wooten v. Pollock, 116 N.J. Eq. 490, 174 A. 497;
Union County Building & Loan Ass'n. v. Welchek, 12 N.J.M. 847, 175 A. 625;
Cummings v. Rosenberg, 12 Ariz. 327, 100 Pac. 810—5 months, 10 days;
Bigelow v. Bemis, 84 Mass. (2 Allen) 496;
Stine v. Bennett, 13 Minn. 153—4½ months.
Horbach v. Miller, 4 Neg. 31—4½ months.

4. The statute does not offend the commerce clause.

(a) Inasmuch as Congress has not fixed a period of

limitations within which actions under the Fair Labor Standards Act must be brought, Congress has consented that claims under the Fair Labor Standards Act may be subjected to the statutes of limitations of the various states.

Cooley v. Board of Wardens of the Port of Philadelphia et al., 53 U.S. (12 How.) 299, 13 L. Ed. 996;
Ex Parte Cox, 127 U.S. 731, 32 L. Ed. 274.

(b) The statute of limitations affecting the remedy and not the right, does not deprive an employee of rights granted by federal law. There is no conflict with the commerce clause.

Campbell v. City of Haverhill, 155 U.S. 610, 39 L. Ed. 280;
Brody v. Daly, 175 U.S. 148, 44 L. Ed. 109;
McClaine v. Rankin, 197 U.S. 154, 49 L. Ed. 702.

5. The Oregon statute does not offend the equal protection clause of the constitution.

(a) The group upon which the statute acts—wage earners—has long been recognized as an appropriate group for legislative classification.

Stettler v. O'Hara, 69 Ore. 519 (1914), Affirmed by equally divided Court 243 U.S. 629, 61 L. Ed. 937.
State v. Bunting, 71 Ore. 259, 243 U.S. 426, 61 L. Ed. 830.

(b) Overtime wages likewise has long been recognized as an appropriate classificaion for legislative action.

(c) The classification is reasonable.

(d) The statute is not discriminatory against federal rights as it applies to claims for overtime penalty of liquidated damages under any statute, federal or state.

Oregon Laws 1943 Chapter 265.

ARGUMENT

Statutes of limitation are entitled to the same "respect" as other statutes; [2] as "wise and beneficial"[3] statutes of "repose," [4] they are founded upon the "sound,"[5] "wise and salutary"[6] policy of the "public needs";[7] they "tend to the peace and welfare of society"[8] and are designed to "promote" justice[9] by imposing a "salutary vigilance."[10]

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(2) Clementson v. Williams, 12 U.S. (8 Cranch) 72, 74, 3 L. Ed. 491; United States v. Wilder, 80 U.S. (13 Wall.) 254, 256, 20 L. Ed. 681.
(3) Bell v. Morrison, 26 U.S. (1 Pet.) 351, 360, 7 L. Ed. 174.
(4) Beatty v. Burnes, 12 U.S. (8 Cranch) 98, 107-108, 3 L. Ed. 500; Bell v. Morrison, 26 U.S. (1 Pet.) 351, 360, 7 L. Ed. 174; Pillow v. Roberts, 54 U.S. (13 How.) 472, 477, 14 L. Ed. 228; Leffingwell v. Warren, 67 U.S. (2 Black) 599, 606, 17 L. Ed. 261; Hanger v. Abbott, 73 U.S. (6 Wall.) 532, 538, 18 L. Ed. 939; Riddlesbarger v. Hartford Insurance Co., 74 U.S. (7 Wall.) 386, 389-390, 19 L. Ed. 257; Edwards v. Kearzey, 96 U.S. 593, 603, 24 L. Ed. 793; Campbell v. City of Haverhill, 155 U.S. 610, 616, 39 L. Ed. 280, 15 Sup. Ct. 217; United States v. Oregon Lumber Co., 260 U.S. 290, 67 I. Ed. 261, 43 Sup. Ct. 100.
(5) McCluny v. Silliman, 28 U.S. (3 Pet.) 270, 278-279, 7 L. Ed. 676; Pillow v. Roberts, 54 U.S. (13 How.) 472, 477, 14 L. Ed. 228
(6) Leffingwell v. Warren, 67 U.S. (2 Black) 599, 606, 17 L. Ed. 261.
(7) Campbell v. Holt, 115 U.S. 620, 628, 29 L. Ed. 483, 6 Sup. Ct. 209.
(8) McCluny v. Silliman, 28 U.S. (3 Pet.) 270, 278-279, 7 L. Ed. 676.
(9) Leffingwell v. Warren, 67 U.S. (2 Black) 599, 606, 17 L. Ed. 261; Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348-349, 88 L. Ed. 788, Sup. Ct. 582.
(10) McCluny v. Silliman, 28 U.S. (3 Pet.) 270, 278-279, 7 L. Ed. 676.

The Fair Labor Standards Act of 1938 does not prescribe a statute of limitations applicable to actions brought to enforce rights created by the statute. There is no other federal statute establishing a statute of limitations for this type of action. In the absence of Congressional action fixing a period of limitations, the statute of limitations of Oregon applies to cases instituted in the Oregon District Court.[11] The State statute of limitations is a rule of decision in the federal courts within the meaning of the Conformity Act.[12]

In *Campbell v. City of Haverhill,* the court, considering the application of a State statute of limitations to a right arising under the Federal Patent Laws holding that the state statute was a bar to the proceeding, said (p. 616):

> "* * * In creating a new right and providing a court for the enforcement of such right, must we not presume that Congress intended that the remedy should be enforced in the manner common to like actions within the same jurisdiction?
>
> "Unless this be the law, we have the anomaly of a distinct class of actions subject to no limitations whatever; a class of privileged plaintiffs who, in this particular are outside the pale of the law, and subject to no limitation of time in which they may institute their actions * * *. This cannot have been within the contemplation of the legislative power * * *."

Unless then the Oregon statute is unconstitutional, it must be applied in the instant proceeding. Inasmuch as

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(11) Judiciary Act of 1787, Sec. 34.
(12) Campbell v. City of Haverhill, 155 U.S. 610, 616, 39 L. Ed. 280, 15 Sup. Ct. 217.

it is admitted that the case was not instituted within the time permitted by the Oregon law, the statute, if constitutional, is a complete bar. We turn to the issue of constitutionality.

The statute has been attacked from many sides. It is contended that it offends the due process clause in that it does not afford a reasonable time within which a plaintiff must institute action; it is urged that it infringes upon the commerce clause in that it deprives the plaintiff of rights granted him by Congress; it is suggested that it falls within the ban of "the equal protection of the laws" clause, in that the statute is discriminatory against rights granted by Congress, and the classification upon which the statute is based is unreasonable.

We submit that the answer to the question: Does the statute allow a reasonable time within which to institute suit, provides the answer to all substantial questions of constitutionality presented in this case.

Considering first the due process clause, it is settled that after a cause of action has arisen competent legislative authority may change the statute of limitations applicable to such causes of action. The legislative authority may shorten a period of limitations covering causes of action in existence at the time such legislative action is taken.[13] As we have shown above, the Oregon Legislature, insofar as

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(13) McGahey v. Virginia, 135 U.S. 662, 34 L. Ed. 304;
Terry v. Anderson, 95 U.S. 628, 24 L. Ed. 365;
Atchafalaya Co. v. Williams Co., 258 U.S. 190, 66 L. Ed. 559.

Appellee's rights are concerned, is such a competent authority. It had the lawful power to shorten the statute applicable to Appellee's cause of action although his cause of action was in existence at the time the legislative action was taken.

However, in decreasing the time within which the action must be instituted, a plaintiff must be afforded a reasonable time within which to pursue his remedy.[14] The primary responsibility for the determination of what is a reasonable time is vested, under our form of government, in the legislature.

In *Terry v. Anderson,* 95 U. S. 628, 633, 24 L. Ed. 365, it is said:

> "In all such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all circumstances, reasonable. Of that the Legislature is primarily the judge; and we cannot overrule the decision of that department of the government, unless a palpable error has been committed. In judging of that, we must place ourselves in the position of the legislators, and must measure the time of limitation in the midst of the circumstances which surrounded them, as nearly as possible; for what is reasonable in a particular case depends upon its particular facts."

Referring to that case, it was said in *Mills v. Scott,* 99 U. S. 25, 27, 25 L. Ed. 294:

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(14) Evans v. Finley, 166 Or. 227, 111 P. (2) 833.
Ibid Note 14.

> "* * * The question in such cases, the court said, was whether the time allowed was, under all the circumstances, reasonable; and of this the Legislature of the State was primarily the judge, and its decision would not be overruled unless a palpable error had been committed."

In *Antoni v. Greenhow,* 107 U. S. 769, 774-775, 27 L. Ed. 468, 2 Sup. Ct. 91 it was said:

> "* * * In all such cases the question becomes, therefore, one of reasonableness, and of that the Legislature is primarily the judge * * *. We ought never to overrule the decision of the Legislative Department of the Government, unless a palpable error has been committed. If a state of facts could exist that would justify the change in a remedy which has been made, we must presume it did exist, and that the law was passed on that account. * * * We have nothing to do with the motives of the Legislature, if what they do is within the scope of their powers under the Constitution."

Before giving consideration as to whether the time allowed by the Oregon Legislature for actions to be brought on existing causes of action is sufficient, we will consider the effect of the commerce clause upon the power of the State of Oregon to enact this law. It is admitted that as to matters within its jurisdiction, the authority of Congress is supreme, and that of the State is inferior. Congress, however, did not see fit to include within the Fair Labor Standards Act of 1938 a statute of limitations. Nor is there any other federal law applicable to such a right of action. In the absence of Congressional law, Oregon had

the power to prescribe the period of limitations within which rights created by federal laws must be enforced.[16] The act of inaction by Congress was its consent that the State of Oregon (and all other states) might legislate upon this subject; and, include within the ambit of the Oregon statute, rights created by Congress.[17]

If Congress were not of the opinion that the period of limitations should be fixed by the states, it was within its power to preclude state action by including within the law a period of limitation. If there be question about the soundness of this conclusion, the final answer may be found in the fact that Congress now has before it a bill, which if enacted would fix the period of limitation for rights arising under the Fair Labor Standards Act of 1938 or other federal law.[18] This bill recognizes the power of the States to prescribe statutes of limitation as it makes State laws fixing a period shorter than that proposed applicable to federally created causes of action. We submit that, insofar as the commerce law is concerned, the question is solved by the answer to the question: Is the due process clause violated? Congress has consented that Oregon may enact a statute of limitations. By so doing, it has agreed that such statute does not violate the commerce clause, if, otherwise, it be constitutional. The question then is: Was Appellee granted a reasonable time within which to institute this suit?

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(16) Cooley v. Board of Wardens of the Port of Philadelphia et al., 53 U.S. (12 How.) 299, 13 L. Ed. 996;
Ex parte Cox, 127 U.S. 731, 32 L. Ed. 274.

(17) Campbell v. City of Haverhill, 155 U.S. 610, 39 L. Ed. 280;
Brody v. Daly, 175 U.S. 148, 44 L. Ed. 109;
McClaine v. Rankin, 197 U.S. 154, 49 L. Ed. 702.

(18) H. R. 2788, Appendix II.

Inasmuch as the statute carried an emergency clause, it became effective in accordance with its terms from and after its passage.[19] As to causes of action then in existence, a period of ninety days was allowed for institution of suit. As to causes of action subsequently arising, a period of six months was established. The trial judge concluded that the period of ninety days, applicable to existing causes of action, was unreasonably short. He did not consider whether the six months period afforded a fair opportunity for the institution of a suit.

It is submitted that the period of ninety days within which to institute action upon existing causes of action was a reasonable one. It accorded Appellee ample opportunity to protect his rights.

In the determination of what is a reasonable time, individual cases are not particularly helpful. They do establish controlling principles, but do not furnish an answer to our question. Considering precedents, in the trial court, Appellee cited a number of illustrative cases to prove the statute unconstitutional. We will now consider them.

In the ancient case of *Berry & Johnson v. Bansdall,* 61 Ky. (4 Mot.) 292, one month was held unreasonable. That case, of course, could not be authority that three months or six months was also unreasonable. However, two cases hold that one month is reasonable.[20] *Relyon v. Tomahawk Paper & Pulp Co.,* 102 Wis. 301, 78 N.W. 412, while holding two months to be unreasonable, would not be authority for holding three months or six months

(19) Oregon Constitution Art. IV Sec. 28.
(20) Mulvey v. Boston, 197 Mass. 178, 83 N.E. 402;
Randolph v. Springfield, 302 Mo. 33, 257 S.W. 449.

unreasonable. However, two cases hold that two months is reasonable.[21] Appellee has referred to three cases holding three months to be unreasonable,[22] but six cases hold that three months is reasonable.[23] He cited an ancient case holding that five months is unreasonable,[24] but there are four cases holding that five months is reasonable.[25]

Appellee cited one case and dicta in another to show that six months is unreasonable.[26] There are eight cases holding that six months is reasonable.[27] It is thus apparent that the overwhelming weight of authority supports Appellant's position.

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(21) State ex rel., v. Board of Education, 137 Kan. 451, 21 P. (2d) 295—1½ months;
Vanderbilt v. Hegeman, 157 Misc. 908, 284 N.Y.S. 586. In Bacon et al. v. Howard, 61 U.S. (20 How.) 22, 15 L. Ed. 811, a 60 day statute was applied, and there was no contention that it was unreasonable.

(22) Lamb v. Powder River Live Stock Co., 8 Cir. 132 Fed. 434;
Parmenter v. State, 135 N.Y. 154, 31 N.E. 1035;
Adams and Freeze v. Keneyer, et al, 17 N.D. 302, 116 N.W. 98—3½ months.

(23) Crawford v. Hunt, 41 Ariz. 229, 17 P. (2d) 802;
Steele v. Gann, 197 Ark. 480, 123 S.W. (2d) 520;
De Moss and others v. Newton and another, 31 Ind. 219;
Kozisek v. Bringham, 169 Minn. 57, 210 N.W. 622;
Wooten v. Pollock, 116 N.J. Eq. 490, 174 A. 497;
Union County Building & Loan Ass'n. v. Welchek, 12 N.J.M. 847, 175 A. 625.

(24) Lewis v. Harbin, etc., 44 Ky. (5 B. Mon.) 564.

(25) Cummings v. Rosenberg, 12 Ariz. 327, 100 Pac. 810—5 months, 10 days;
Bigelow v. Bemis, 84 Mass. (2 Allen) 496;
Stine v. Bennett, 13 Minn. 153—4½ months;
Horbach v. Miller, 4 Neb. 31—4½ months.

(26) Blevins v. Utilities, Inc., 209 N.C. 683, 184 SE. 517;
Hathaway v. Merchant's Trust Co., 218 Ill. 580, 75 N.E. 1060—6½ months. dicta.

(27) Wheeler v. Jackson, 137 U.S. 245, 34 L. Ed. 659, 11 Sup. Ct. 76;
Turner v. New York, 168 U.S. 90, 42 L. Ed. 392, 18 Sup. Ct. 38;
Saranac Land, Etc., Co. v. Comptroller of N.Y. 177 U.S. 318, 44 L. Ed. 786, 20 Sup. Ct. 642;
Tipton v. Smythe, 78 Ark. 392, 94 S.W. 678;
Fitzgerald v. Scovill Mfg. Co., 77 Conn. 528, 60 Atl. 132—6½ months;
Myers v. Wheelock, 60 Kan. 747, 57 Pac. 956;
Russell v. H. C Akeley Lumber Co., 45 Minn. 376, 48 N.W. 3;
Davidson v. Witthaus, 106 App. Div. 182, 94 N.Y.S. 428.

As we have pointed out above, the basic issue is whether Appellee was allowed a reasonable time within which to institute his action. Reasonable is a relative term. Ordinary men may differ as to the proper application of that word. Being relative, only relative answers can be given in most cases. Because of that fact, courts properly do not take sides on such argumentative questions, but say that the only question of which they can take cognizance is one of law. In jury cases, the question of law involved is whether there is any substantial evidence to support the verdict. In constitutional law cases, the question of law is whether an ordinary man could reasonably take the view which the legislature adopted.

Thus in the above quotations when it is said that the legislative decision must be upheld unless it is palpably erroneous, it is meant that the legislative action is immune from judicial action unless the court can say that no ordinary man could reasonably take the view adopted by the legislature. The rule applicable to classifications under the equal protection clauses, as shown infra, is whether there is any rational basis for the legislative action taken —which means nothing more than what we have stated previously. If reasonable men might differ on what is a reasonable time, the decision of the legislature must be upheld—otherwise, the court is substituting its judgment on a debatable issue for that of the legislatures. Such action would be a wholly unwarranted interference with the legislative function.

It is difficult in most cases to say that a group of people, theoretically, at least, representing a majority of the

people, have acted unreasonably. For that reason, if there is a state of facts which an ordinary reasonable man could accept as justifying the action taken, the legislative action is upheld, because it is presumed that the legislature acted on that state of facts. Appellant contends that the time prescribed by the statute in question, viewed in the light of the circumstances attending its adoption and tested by the constitutional principles laid down by the courts is entirely reasonable. At least, even when most critically regarded, it remains a subject upon which reasonable men might differ. So considered, its constitutionality is firmly established.

We need not look afar to find a basis to support the legislative action. There have been in effect in Oregon for many years statutes and regulations issued pursuant to limiting the number of hours worked by women and minors, and authorizing recovery of overtime pay for work performed in excess of the stipulated hours.[28] In substance, these statutes are akin to the Fair Labor Standards Act and create similar rights of action. With the advent of the Fair Labor Standards Act and the numerous actions brought under it for overtime, there may be found complete justification for the Oregon statute.

In the last few years, the uncertainties of the application of the federal statute have been emphasized. The application of the act to loft buildings was settled in 1942 in *Kirschbaum v. Walling.*[29] The application of this

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(28) See Appendix III.
(29) 316 U.S. 517, 86 L. Ed. 1638.

statute to commercial office buildings was not settled until 1945, by the decision of the court in the case of *10 East 40th Street Building v. Callus,* 89 L. Ed. (Adv. Ops.) 1244, but compare *Borden Company v. Borella,* 89 L. Ed. (Adv. Ops.) 1240. In view of the vigorous dissent, it may well be questioned whether the construction adopted in that case will be the final one. The evolution of the term production of goods for interstate commerce has not been completed. The twilight zones between the power of Congress and the power of the State are even more hazy and more cloudy than ever before. The Oregon statutes and regulations requiring premium or overtime pay, of course, apply only to work over which the State has control. The federal statute covers the remaining portion of the field. The uncertainties as to coverage, and the practical impossibility of determining coverage at any one time in the disputed field would justify action by the State of Oregon applicable to all cases of overtime or liquidated damages for work performed in excess of the stipulated hours. Such a law was passed. It applies to overtime or premium pay, including penalties required or authorized by "any" statute. By its terms, the statute applies to federal and state created rights.

These uncertainties, as to coverage, impose a terrific financial burden upon employers at large. The federal and state laws permit the accumulation of secret overtime, liquidated damages and penalties. An employer as well as an employee, in all good faith, intelligently advised as to the coverage of the laws, could well conclude that he was not subject to the penalties of the laws only

to be confronted years later with claims for tremendous sums. A statute established by Congress or the State Legislature, which could be applied in such a manner against an employer, who has been lulled into a false feeling of security by the failure of an employee to institute an action, is not fair. The Oregon Legislature well could conclude that claims to enforce rights given by legislation should be enforced promptly. Concluding that an employer, who is required to plan his business in the light of known liabilities, is also entitled to know his liabilities for overtime pay and penalties granted by the Legislature or Congress as a privilege to employees, the Legislature justifiably could decide that claims running back for a period of five years should be brought promptly and disposed of. The Oregon Legislature concluded that these stale claims must be brought within a period of ninety days.

The charge has been made that the Oregon statute was aimed at the Fair Labor Standards Act. The Federal Act and the experiences under it are important but not for the reason advanced by those attacking it. The experiences under the Federal Act with the continuing enlargement of what must be considered hours worked (travel time serves as an example) illustrates the desirability of a special short period of limitations. The Federal Act was the teacher; not the target of the Oregon Legislature. The same problems arise under the Oregon statutes and regulations and justify the legislation.

The Appellee Kurth in the instant case had ample time within which to bring his action. He knew that he had a

claim against Appellant for liquidated damages and overtime. He attempted to enforce that claim by placing it in the hands of the Wage and Hour Division Manager, in Portland, for prosecution. (R. p. 14). His services with Appellant were terminated in September, 1942. This action was instituted in February of 1944, approximately eighteen months thereafter. He had until June of 1943 to bring this action. Surely this period of nine months is not an unreasonable one. No good reason can be suggested why he should have more time. He knew the type of work he was doing. He knew where his employer could be found.

He recognized that he had a claim for overtime under the Fair Labor Standards Act by consulting the Wage and Hour Division in Portland, Oregon. Having consulted the Wage and Hour Division, having employed counsel to prosecute his claim all before the period of the statute of limitations ran, his statement now that he did not have sufficient time within which to institute action against his employer cannot be accepted.

In the foregoing presentation, we have considered only whether the ninety day period allowed by the statute for the institution of action on existing causes of action was reasonable. However, it is clear that if there be uncertainty as to the reasonableness of the ninety day period, Appellee, in any event, had the full six months allowed by statute within which to institute this lawsuit. In *Koshkonong v. Burton,* 104 U.S. 668, it appeared that:

The town of Koshkonong, Wisconsin, issued its bonds in January, 1857, to which were attached interest coupons. The bonds were payable January 1, 1877, twenty years later. The interest coupons which the court in its opinion held to be entire obligations, were due semi-annually, that is the first day of July and the first day of January of each year following issuance of the bonds. No interest coupons were detached after January, 1858.

An action to recover the principal amount of the bonds and of the coupons was commenced in 1880. This was more than twenty years after issuance of the bonds and approximately three years after the maturity date of the bonds. It was twenty-two years after the maturity of the oldest coupons.

When the bonds and coupons were issued, the statute of limitations applicable thereto was twenty years. In 1872, a new statute of limitations was passed providing:

> " 'No action brought to recover any sum of money, on any bond, coupon, interest warrant, agreement, or promise in writing, made or issued by any town, county, city or village, or upon any installment of the principal or interest thereof, shall be maintained in any court, unless such action shall be commenced within six years from the time when such sum of money *has or shall become due* * * * Provided, that any such action may be brought within one year after this act shall take effect; *provided* further, that this act shall in no case be construed to extend the time within which an action may be brought under the laws heretofore existing.' "

The limitation period to which actions on these obligations were subject prior to the passage of the act of 1872 was twenty years, and, at the time of the passage of the new statute of limitations, neither the bonds nor coupons were outlawed. The court on these facts then gave its attention to the effect of the new statute on obligations which were valid and subsisting, at the time it was adopted. It said:

> "Of the object of that statute there cannot, it seems to us, be any reasonable doubt. The specific reference to coupons and interest warrants made or issued by towns, counties, cities, and villages, without distinguishing such as are sealed from those unsealed, and the express requirement as to the time within which actions thereon must be brought or be barred, indicates a purpose upon the part of the legislature to reverse the policy which had been pursued, by holders of such securities, of postponing the collection of interest coupons until after the bonds, to which they were annexed, had matured,—a delay which had the effect, in some instances, of compelling municipal corporations to meet, all at once, a large indebtedness, which the legislature intended, at least as to the interest accruing thereon, should be provided for in installments or through a series of years. Whatever considerations, however, may have suggested that legislation, it is clear that its object was such as we have indicated."

It was contended in that case that the act of 1872 was unconstitutional as impairing the obligation of the contract between the town and the holders of its securities. The objection was based on the proviso that any such action (of the class specified in the act) may be brought (only) within one year after the act took effect. The court said:

"While that proviso is very obscurely worded, its meaning is, that no action to recover money due upon a municipal bond, coupon, interest-warrant, or written agreement or promise, or upon any installment of the principal or interest thereof, whether such obligations were issued before or after the passage of the act, should be maintained, unless brought within six years (not from the passage of the act, but) from the time the money sued for became due; except—and no other exception is made—that when the six years from the maturity of any past-due bond or coupon would expire within less than a year after the act passed, the action should not be barred, if brought within that year. It was undoubtedly within the constitutional power of the legislature to require, as to existing causes of action, that suits for their enforcement should be barred unless brought within a period less than that prescribed at the time the contract was made or the liability incurred from which the cause of action arose. The exertion of this power is, of course, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of an action before the bar takes effect. Whether the first proviso in the act of 1872, as to some causes of action, especially in its application to citizens of other States holding negotiable municipal securities, is or not in violation of that condition, is a question of too much practical importance and delicacy to justify us in considering it, unless its determination be essential to the disposition of the case in hand. And we think it is not. For if the proviso, in its application to some cases, is obnoxious to the objection that it does not allow sufficient time within which to sue before the bar takes effect, and is, therefore, unconstitutional, as impairing the obligation of the contract between the town and its existing creditors, it does not follow that the entire act would

fall and become inoperative. The result, in such case, would be, that the plaintiffs and other holders of the coupons would have not simply one year, but—under the construction we have given to the statutes in force prior to the act of 1872—to a reasonable time after its passage within which to sue. And if a proper construction of that act would give the full period of six years, after its passage, within which to sue upon coupons maturing before its passage, the judgment below cannot be sustained. For this action was not instituted until more than eight years after the passage of the act of 1872. It is, consequently, barred by limitation as to all coupons falling due (and, therefore, collectible by suit without reference to the maturity of the bonds) more than six years prior to its commencement. The bar was complete more than six years before the revision of 1878 took effect, even if that revision should be deemed to have any application to this action. There is no escape from this conclusion, unless we should hold that the legislature could not, constitutionally, reduce limitation from twenty to six years as to existing causes of action. But neither upon principle nor authority could that position be sustained."

The court thus reached its conclusion by reasoning:

(1.) If a savings clause in an amendatory statute of limitations is unconstitutional, the entire statute does not for that reason necessarily fall, but a construction should be given to the statute which will preserve its constitutionality and yet effectuate the intention of the legislature.

(2.) The statute of 1872 was clearly intended to operate upon causes of action accrued prior to the passage as well as causes of action accruing after its passage.

(3.) This intent is manifest from the words of the statute "within six years from the time when such sum or money *has or* shall become due."

(4.) If the savings clause so construed and applied does not expressly provide an adequate time within which to sue on accrued causes of action, the court will respect the legislative intent and apply the full period of the statute of limitations to accrued causes of action.

(5.) If the full time permitted by the new statute affords a plaintiff a reasonable time in which to institute suit on existing causes of action, the statute is constitutional.

(6.) Plaintiff having failed to bring his action (accrued prior to effective date of the act) within the full time provided by the new statute for action on future accruing cases, may not complain of the shortness of the savings clause, and is barred.

Simply stated the court decided that if the savings clause of new statute of limitations is not valid, (an issue expressly left undecided) the legislature's intention to reduce the time previously provided for action on causes accrued prior to effective date of the new act is not to be frustrated and such causes left unaffected by the new statute, but the new statute is made to operate *prospectively* on such causes; that is from the date that the new statute becomes operative. By so holding no rights are destroyed and no remedies eliminated.

The analogy between the *Koshkonong* case and the case at bar is readily apparent. There, as here, a new statute of limitations was passed, which shortened the time provided for actions on causes of a certain class. There, as here, the statute of limitations in effect when the cause accrued, was superseded by the new act. There, as here, the words of the new statute compelled its application to accrued causes of action as well as accruing causes of action. There, as here, the time expressly prescribed for action on causes accrued prior to the effective date of the statute was materially shorter than the time provided for action on causes accruing thereafter. There, as here, objection was seriously made that the shortness of the savings clause rendered it invalid, and that the entire statute was therefore unconstitutional. There, as here, plaintiff, although the owner of a cause of action which had accrued prior to the passage of the statute, did not bring his action within either the period prescribed by the savings clause or the time prescribed for actions on causes arising in the future.

The analogy is complete, and, we submit, the result should be the same.

The doctrine of the *Koshkonong* case is the law of the State of Oregon. In the early case of *McLaughlin v. Hoover*, 1 Ore. 31, Plaintiff's action was in assumpsit on a promissory note executed October 2, 1845 and due one year after date. The limitation period then in effect was six years. In 1849, after that statute had run approximately three years against plaintiff's cause of action a

new statute was passed repealing the old and providing that actions in assumpsit shall be commenced "within six years after the cause of action shall have accrued."

Again in 1852 a new statute was enacted, also fixing a period of six years within which action must be instituted. This statute did not repeal existing legislation, although the 1849 law did. When the 1849 statute, which was in effect at the time plaintiff's cause of action accrued, was repealed, three years had run against plaintiff's cause of action. Defendant claimed that in computing the time which had run against plaintiff's cause of action, the three years which ran prior to the law of 1849 should be tacked to time which ran after the law of 1849 to provide the bar of the six-year statute. The court held that the act of 1852 did not repeal that of 1849. The terms of the statutes were consistent. It was the duty of the court to construe the two acts together. They "must be taken as one act." Said the court:

> "When we look at all our limitation acts, to ascertain the mind of our legislature, we find a repealing clause in the act of 1849, but none in that of 1852. We can only explain the difference in these two statutes by supposing a difference of intention, and a design to let the act of 1849 run against those causes of action upon which it had commenced to operate. We hold, therefore, that the act of 1852 is a mere continuation of the act of 1849, and that both are to be taken, with reference to this case, as one limitation law. Can, then, a bar to this suit be allowed, by computing time before the act of 1849 took effect? 'Shall have accrued', in that statute, is peculiar phraseology, and seems to indicate causes of action then existing. Limitation

> laws effect the remedy, and the legislative power has the same right to regulate and restrict remedies upon causes of action in existence as upon causes of action to be created. When the law is made operative *in praesenti,* courts cannot legislate away the effect, and declare that it shall operate only *in futuro.*"

The court held that neither the act of 1849 nor the act of 1852 gave plaintiff's cause of action renewed life because the cause of action was subject to the statute of 1849, which allowed six years from the time the cause of action accrued. Inasmuch as three years already had run, plaintiff was allowed only three years after the law of 1849 became effective. The court said:

> "We concur with the Supreme Court of the United States in the opinion expressed in the case of Ross v. Duval, 13 Pet. 45. The court there says: 'It is a sound principle, that when a statute of limitations prescribes the time within which a suit shall be brought or an act done, and a part of the time has elapsed, effect may be given to the act; and the time yet to run, being a reasonable part of the whole time, will be considered the limitation in the mind of the legislature in such cases.' "

The court found that it was the intent of the legislature that the act of 1849 apply to causes of action which had accrued prior to its enactment. The legislative intent was clear inasmuch as the law of 1849 repealed all existing legislation in conflict with its terms. If the law of 1849 did not apply to existing causes of action, those causes were removed from the bar of any statute of limitation. Obviously the legislature, in enacting a statute of limitation, did not intend to remove a special group of causes

of action (those then in existence) from the operation of the law.

Shortly thereafter the court was again faced with the effect of an amendatory statute of limitation upon existing causes of action.

In *Pitman v. Bump,* 5 Ore. 17, the Oregon Supreme Court had before it for decision a case involving the construction and application of an amendatory statute of limitations. In that case the limitation period in effect when the cause of action accrued was three years. Within approximately seven months after the cause accrued the legislature amended the statute by reducing from three to two years "after the cause of action shall have accrued," the period within which to commence actions. No provision was made for causes accrued prior to and existing on the effective date of the amendment. Plaintiff's action was commenced after the amendment became effective and more than two years (but less than three) after the cause had accrued.

The new statute did not expressly apply to causes of action which had accrued prior to its enactment. The statute differed from the one considered in the *McLaughlin* case in that it did not repeal the existing law but only amended it. Concerned again with the determination of the legislative intent, which of course is the controlling principle in all cases of statutory construction, the court found that the legislature did not intend that the new statute should subject accrued causes of action to its terms.

The legislative intent, and the determination by the court of that intent cannot be too strongly emphasized. In the *McLaughlin* case, the court found that the leigslature intended that the statute of 1849 should apply to causes of action which had already accrued. The court was influenced to reach this conclusion by the fact that the new statute repealed existing legislation. In the *Pitman* case, the court found that the legislature intended that the new statute should not apply to existing causes of action. As a result, the existing causes of action remained subject to the terms of the old statute which was not repealed by the Oregon legislature.

Chapter 265, with which we are now concerned, repealed all acts to the extent that they were inconsistent with its terms. Being a repealing statute, the situation before us is more similar to that in the *McLaughlin* case. The legislative intent, that Chapter 265 should apply to causes of action in existence, and upon which the earlier statute operated, is equally clear. The legislature added a savings clause that actions on claims heretofore accrued should be brought within ninety days of the effective date of the law. This clear declaration that the statute applies to accrued causes of action makes it unnecessary to search for a legislative intent. It is equally clear that the legislature thought that six months was an adequate period for the institution of causes of action. The predominant legislative intent was to impose a six months' bar to these causes of action. It is predominant also that existing causes of action as well as future causes of action should be controlled by the statute. The cause of action presented

in this case accrued prior to the enactment of Chapter 265. This action was brought more than six months after the cause of action accrued and more than six months after Chapter 265 became effective.

The bases of the decision of the U. S. Supreme Court are its prior decisions in *Ross v. Duval,* 13 Pet. 62 and *Sohn v. Waterson,* 17 Wall. 596. It is noteworthy that the Oregon court in the *McLaughlin* case, supra, expressly concurred "with the Supreme Court of the United States and the opinion expressed in the case of *Ross v. Duval,* 13 Pet. 45."

The real issue in this case then, is not whether the ninety day period for existing causes of action is a reasonable one, but assuming that it is unreasonably short, whether the six months' period is adequate. This question was not passed upon by the trial judge, and nothing in his opinion nor in his comments during the course of the trial indicates his view that the six months period was unreasonably short. (R. p. 27). That question was not answered, because the trial judge, without considering the Oregon cases of *McLaughlin v. Hoover* and *Pitman v. Bump,* supra, did not apply the Oregon doctrine that the general period allowed by the statute of limitations applied to existing causes of action if the special period were unreasonably short. In this the trial court erred.

What we have said above justifying, in our opinion, the reasonableness of the ninety day period, applies with even more force to the six months clause.

Oregon long has had a legislative history of relative short periods of limitations for special types of action.

Suits to enforce labor liens and liens on certain chattels are subject to a ten-day limitation period. (Sec. 67-606, O.C.L.A.) Proceedings to revalue estate property and to contest certain elections are barred after thirty days. (Secs. 20-137, 81-1901, O.C.L.A.) Suits to enforce a number of labor liens are barred after six months. (Secs. 67-107, O.C.L.A.) The Legislature, of course, was familiar with these statutes. It must also be presumed that the Oregon Legislature knew that at least twenty-six other states had enacted various statutes of limitation fixing a period of ninety days or less, and that at least thirty-eight states had enacted various statutes of limitation fixing a period of six months or less, and that in nearly all such states, proceedings to enforce various labor liens had been limited to a period of six months or less. Thus enforcement of such liens—rights created by statute—were limited to periods which in some instances were shorter than the one fixed by the Oregon statute. Why is not a statute relating to enforcement of similar rights created by statute valid?

The trial court concluded that the commerce clause was infringed by the Oregon statute because the ninety day period for the institution of suits on existing causes of action was unreasonably short. We have shown that Congress has consented that that State of Oregon may legislate and establish statutes of limitations applicable to causes of action arising under the Fair Labor Standards Act of 1938. We have shown that valid action by the State Legislature does not conflict with the commerce clause of the United States Constitution. It follows inescapably

that inasmuch as Congress has consented that a valid statute may be so applied, there is no conflict with the commerce clause, regardless of the period of time allowed for the institution of suits. To determine whether the period is reasonable, upon which the validity of this statute is dependent, we look not to the commerce clause but to the due process clause. In so doing, we have demonstrated that the Appellee had approximately nine months in which to bring suit upon his cause of action after his employment was terminated and before the ninety day period elapsed. We believe we have demonstrated that the ninety day period applicable to existing causes of action is a reasonable one. If it be unreasonable, or if there be uncertainty as to its reasonableness, most assuredly the full six months period, which Appellee would then be accorded, is amply sufficient. It follows that the trial court was in error, and its decision should be reversed.

Little need be said as to the other charge of unconstitutionality raised by Appellee. It is contended that the equal protection of the law has been violated, in that the classification upon which the statute acts is unreasonable. To this we cannot subscribe. For years, the employment relationship has been recognized as furnishing the proper basis of classification for legislative action. For years, and particularly in Oregon, statutes have been in effect and upheld regulating the hours of work and prescribing overtime penalties for work performed in excess of those hours.[30]

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(30) Stettler v. O'Hara, 69 Ore. 519 (1914), affirmed by equally divided Court 243 U.S. 629, 61 L. Ed. 937;
State v. Bunting, 71 Ore. 259, 243 U.S. 426, 61 L. Ed. 830.

The act under which Appellee claims, the Fair Labor Standards Act of 1938, operates upon the very classification which Appellee suggests is unfair. This suggestion that this classification is unfair has no support and should be disregarded.

Respectfully submitted,

R. N. KAVANAUGH,
Mead Building, Portland, Oregon.

HUGH L. BIGGS,
DAVID L. DAVIES,
Yeon Building, Portland, Oregon.

R. R. MORRIS,
Pacific Building, Portland, Oregon,
Attorneys for Appellant.

Of Counsel

HART, SPENCER, MCCULLOCH & ROCKWOOD,
Yeon Building, Portland, Oregon.

HAMPSON, KOERNER, YOUNG & SWETT,
Pacific Building, Portland, Oregon.

APPENDIX I

"CHAPTER 265

AN ACT

"To limit certain actions or suits filed in any court for the recovery of overtime or other premium pay and penalties thereunder; to provide a saving clause; to repeal any law to the extent it is in conflict therewith; and to declare an emergency.

"Be It Enacted by the People of the State of Oregon:

"Section 1. Recovery for overtime or premium pay accrued or accruing, including penalties thereunder, required or authorized by any statute shall be limited to such pay or penalties for work performed within six months immediately preceding the institution of any action or suit in any court for the recovery thereof; provided, that an action may be maintained within a period of 90 days after the effective date of this act on claims heretofore accrued.

"Section 2. Any law in conflict herewith to that extent is repealed hereby.

"Section 3. It hereby is adjudged and declared that existing conditions are such that this act is necessary for the immediate preservation of the public peace, health and safety; and an emergency hereby is declared to exist, and this act shall take effect and be in full force and effect from and after its passage.

"Approved by the governer March 10, 1943.

"Filed in the office of the secretary of state March 10, 1943."

APPENDIX II

"H. R. 2788

"IN THE HOUSE OF REPRESENTATIVES

"March 27, 1945

"Mr. Gwynne of Iowa introduced the following bill; which was referred to the Committee on the Judiciary.

"A BILL

"To amend title 28 of the United States Code in regard to the limitation of certain actions, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 28 of the United States Code, as amended, be further amended by adding a new section to be known as section 793, and to read as follows:

" 'SEC. 793. Except as otherwise provided in any action (statute) creating a right of action to recover damages, actual or exemplary, no action under the laws of the United States shall be maintained unless the same is commenced within one year after such cause of action accrued, unless a shorter time be fixed in any applicable State statute; Provided, however, That public actions to recover money damages may be enforced if brought within two years after the cause of action accrued except when the United States is not the real party at interest; Provided further, That the person liable for such damages shall, within the same period, be found within the United States so that proper process thereof may be instituted and served against such person.' "

APPENDIX III

OREGON STATUTES AND REGULATIONS CREATING OVERTIME OR PREMIUM PAY OR LIQUIDATED DAMAGES

O.C.L.A. 1940 Sec. 102-502 provides:

"No person shall be employed in any mill, factory or manufacturing establishment in this state more than ten hours in any one day, or in sawmills, planing mills, shingle mills and logging camps more than eight hours, exclusive of one hour, more or less, in one day or more than forty-eight (48) hours in one calendar week, except logging train crews, watchmen, firemen and persons engaged in the transportation of men to and from work, and employees when engaged in making necessary repairs, or in the case of emergency where life and property is (are) in imminent danger; provided, however, employees may work overtime not to exceed three hours in one day, conditioned that payment be made for said overtime at the rate of time and one-half the regular wage. The provisions of this section shall not apply to persons employed in the care of quarters or livestock, conducting messhalls, superintendence and direction of work, or to the loading and removal of the finished forest product."

Sec. 102-323, O.C.L.A.

"No female shall be employed in any manufacturing, mechanical or mercantile establishment, laundry, hotel or restaurant, or telegraph or telephone establishment or office, or by any express or transportation company in this state more than ten hours during any one day, or more than sixty hours in one week. The hours of work may be

so arranged as to permit the employment of females at any one time so that they shall not work more than ten hours during the twenty-four hours of one day or sixty hours during any one week. Provided, however, that the provisions of this section in relation to the hours of employment shall not apply to nor affect females employed in harvesting, packing, curing, canning or drying any variety of perishable fruit, vegetable or fish. Provided further, they be paid time and a half for time over ten hours per day when employed in canneries or driers or packing plants. Provided, also, that piece workers shall be paid one and a half the regular prices for all work done during the time they are employed over ten hours per day."

Sec. 102-304, O.C.L.A. (as amended by Ch. 20, Laws of 1941), authorized the Wage and Hour Commission of Oregon to fix certain standards relating to working conditions, hours of pay, et cetera for minor and women employees.

Sec. 102-313, O.C.L.A. (as amended by Ch. 20, Laws of 1941) authorizes the Commission to promulgate rules and regulations for carrying into effect the provisions of the preceding section.

Pursuant to provisions of these sections, the Wage and Hour Commission has by official order established certain minimum wage and maximum hour standards for women and minor employees in numerous industries not specified in Section 102-323. These orders generally provide that employers may apply to the Wage and Hour Commission for special overtime permits to work em-

ployees longer hours than the specified maximum hours *on condition that the worker receive time and one-half a regular rate of pay for all time in excess of the regular hours.*

Sec. 102-320, O.C.L.A. (as amended by Ch. 20, Laws of 1941) authorizes actions by women employees to recover the minimum wages for the work performed as established by the Commission and attorneys' fees.